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IN THE

Supreme Court of the United States

October Term, 1966

No. 356

JUAN RIGORES SARDINO,

Petitioner,

against

THE FEDERAL RESERVE BANK OF NEW YORK and THE SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR RABINOWITZ,
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Attorneys for Petitioner.

July 18, 1966

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No.

JUAN RIGORES SARDINO,

Petitioner,

against

THE FEDERAL RESERVE BANK OF NEW YORK and THE SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Juan Rigores Sardino respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on April 22, 1966, affirming an order and judgment of the District Court for the Southern District of New York dismissing the complaint herein.

Opinions Below

The District Court wrote an opinion, not officially reported, and printed in the Joint Appendix in the Court of Appeals at pp. 15a-24a thereof. The Court of Appeals wrote an opinion, not officially reported, a copy of which is annexed hereto as Exhibit A.

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. May the United States, through the application of the Cuban Assets Control Regulations, deprive petitioner of his property in the United States without providing any compensation therefor, petitioner being a resident and national of the Republic of Cuba?

2. Does the Trading with the Enemy Act of 1917, as amended, and particularly § 5(b) thereof, permit the Secretary of the Treasury to adopt regulations which, as here applied, operate to deprive petitioner of his property in the United States without any compensation therefor?

3. Does the Presidential Proclamation of Emergency dated December 16, 1950, justify the adoption of the Cuban Assets Control Regulations?

4. Is § 5(b) the Trading with the Enemy Act, as amended unconstitutional on the ground that it delegates legislative power to the President?

5. Under § 5(b) of the Trading with the Enemy Act as amended may the President delegate his power to deal with foreign relations to the Secretary of the Treasury and through him to the Director of the Office of Foreign Assets Control?

6. Do the Cuban Assets Control Regulations violate the treaty obligations of the United States?

Applicable Constitutional Provisions, Statutes, Proclamations and Regulations

The applicable constitutional provisions are the Fifth Amendment to the Constitution of the United States, Art. I, Sec. 1 and Art. VI.

The applicable statute is the Trading with the Enemy Act of 1917, as amended and particularly § 5(b) thereof, 50 U. S. C. App. § 5(b). The applicable treaties are the Buenos Aires Protocol of Non-intervention of December 23, 1936 (51 Stat. 41, T. S. 923) and the Charter of the Organization of American States of April 30, 1948 (2 U. S. T. 2395). The applicable regulations are the Cuban Assets Control Regulations, 31 C. F. R. § 515.101 *et seq.* The relevant provisions of the statutes, treaties and regulations are attached to this petition as Exhibit B.

Statement of the Case

The jurisdiction of the court of first instance was invoked under:

(a) Tit. 28 U. S. C. §§ 1337 and 2201, in that petitioner seeks a declaratory judgment in an action arising out of an Act of Congress regulating commerce, namely, § 5(b) of the Trading with the Enemy Act, 50 U. S. C. App. § 5(b).

(b) Tit. 12 U. S. C. 632, in that this is an action to which a Federal Reserve Bank is a party.

(c) Tit. 5 U. S. C. 1009, in that petitioner seeks review of actions by the defendants which are government agencies.

(d) Tit. 50 U. S. C. App. § 17, in that petitioner seeks review of action taken by the respondents purportedly pursuant to Tit. 50 U. S. C. App. § 5(b).

Facts

Petitioner is a Cuban national living in Havana. He is about sixty years of age and has no connection with the Cuban Government except that he is employed as a longshoreman by a government agency. He has a savings account in a New York bank in which a sum of about $7,000 stands to his credit. This sum represents the proceeds of an insurance policy on the life of petitioner's son, who died recently in the United States (3a, 4a, 6a, 7a, 9a).[1]

The depositary has refused to pay the sum to petitioner because he is a Cuban national and appears to be covered by the Cuban Assets Control Regulations, 31 C. F. R. 515.101 *et seq.* (hereinafter referred to as the regulations) and particularly § 515.201 thereof (4a). Accordingly, in March, 1964, petitioner applied to respondents for a license; when his application was denied, he sought reconsideration, which was likewise denied (4a, 6a-11a). The only reason given for the denial is that "transactions of this type are not consistent with the present policy of this government with respect to Cuba" (9a).

No hearings of any kind were ever held, nor do the regulations make provision therefor.

Reasons Relied on for the Allowance of the Writ

1. Through the application of the regulations to his bank account, petitioner has been deprived of all effective use of it. This has not been the result of any conduct on his part, but is the consequence solely of his Cuban nationality and residence. The prohibition against his use of his own money is without time limit; its duration may be for a year, for five years or forever. It has already been operative against him for over three years; it may well be operative for the rest of his life.

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[1]References are to the Joint Appendix printed for the Court of Appeals, copies of which are being filed with this Court.

The court of appeals held that the Trading with the Enemy Act and the regulations made pursuant thereto, as applied here, deprived petitioner of his property without compensation. The court said:

> "The due process clause speaks in terms not of taking but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which might outrun his life."

However, the court below held that such deprivation was not without due process of law and hence dismissed the complaint.

The regulations, generally referred to as "freezing regulations" are purportedly authorized by § 5(b) of the Trading with the Enemy Act, 50 App. U. S. C. § 5(b).[2] The Act was originally a wartime measure of World War I and § 2 thereof defines "enemy" as the government of a nation with which the United States is at war or a resident or citizen of such a nation (§ 2). In its present form, § 5(b) authorizes the President to "freeze" the property of foreign countries or their nationals, *i.e.*, to prohibit transactions in foreign exchange, and to prevent or prohibit any transfer or dealing in any property in which a foreign country or a national thereof has an interest. The same section further authorizes the President to order the transfer, or vesting, of the property of a foreign country or a national thereof in such agency or person as may be designated by him.

No form of administrative or judicial review is provided in the case of a freezing regulation; however, § 9(a) of the Act permits judicial review of a vesting order. It provides that any person, not an enemy or ally of an enemy, claiming any right or title in property which has

[2] The legislative history of the Act is not relevant to this point but will be discussed at p. 10 below.

been transferred to the Alien Property Custodian[3] may file a notice of claim and if the property is not returned may recover the same through the institution of a suit in equity.

There seems to have been no litigation passing upon the operation of any of the freezing regulations adopted under § 5(b) in either World War I or World War II. As the Court of Appeals has held in this case, however, the difference between freezing and vesting is, in constitutional terms unimportant, as both constitute a deprivation of property forbidden by the Fifth Amendment. The vesting provisions in both wars were the subject of litigation. See *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479 (2d Cir. 1920), aff'd *sub nom. Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *Guessefeldt* v. *McGrath*, 342 U. S. 308; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480; *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943); see also *United States* v. *Broverman*, 180 F. Supp. 631, 635 (S. D. N. Y. 1959).

This Court has made it abundantly clear that if § 5(b) and the vesting orders issued thereunder are to be held constitutional, some provision must be made to protect the property of non-enemy aliens. Thus, in *Silesian-*

[3] In its original form (40 Stat. 411), the statute designated the Alien Property Custodian as the custodian of enemy property subject to a vesting order. All references to vesting, including references to the Alien Property Custodian, were omitted in the 1933 amendment to § 5(b) (48 Stat. 1) and when provision for vesting was restored to § 5(b) in 1941 (55 Stat. 839), it provided for vesting in any agency or person designated by the President. §§ 7(c) and 9(a), however, were not amended either in 1933 or 1941 and hence 1917 the statutory reference to the Alien Property Custodian remains undisturbed. By Executive Order No. 9788, October 14, 1946, the Attorney General succeeded to all of the powers and duties of the Alien Property Custodian.

American Corp. v. *Clark, supra,* this Court said, at page 479-480:

> "The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Volunteer Fleet* v. *United States, supra.* We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken . . ."

This Court repeated substantially the same language in *Guessefeldt* v. *McGrath, supra,* at page 318, and in *Clark* v. *Uebersee Finanz-Korp., supra,* at page 487 the Court said:

> "It is hard for us to assume that Congress adopted that drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that § 7(c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment."

We know of no decisions in this Court justifying the freezing or vesting of property of foreign nationals in peacetime. None of the cases decided by the lower federal courts have faced this problem. *United States* v. *Quong,* 303 F. 2d 499 (6th Cir. 1962), *cert. denied,* 371 U. S. 863; *United States* v. *China Daily News,* 224 F. 2d 670 (2d Cir. 1955), *cert. denied,* 350 U. S. 885, and *United States* v. *Broverman,* 180 F. Supp. 631 (S. D. N. Y. 1959) involve restrictions on trade which did not constitute a deprivation of property and, hence, did not raise any constitutional questions under the Fifth Amendment.

Since petitioner is not an enemy nor an ally of an enemy, he would be entitled to the return of his property under § 9(a) of the Act or under "such remedy as [he] might have under the Fifth Amendment" if there had been a vesting of that property. Yet there can be no doubt that he has been deprived of his property by the freezing regulation as surely as if said property had been vested. Hence, the Constitution imposes the same restrictions on freezing as it does on vesting, and petitioner is entitled to his property since he is not "an enemy or an ally of an enemy."

The court below argued that it could not be blinded to the acts of the country of which petitioner was a national and that while the Constitution protects the alien from arbitrary action by our government, it does not protect him "from reasonable response to such action by his own. . . . We are not formally at war with Cuba but only in a technical sense are we at peace. . . ."

But in *Banco Nacional* v. *Sabbatino*, 376 U. S. 398, 410, this Court pointed out that "[t]his Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence. . . ." We are clearly not at war with Cuba; not only has there been no declaration of war, but there is no military action of any sort between the two governments nor has there ever been.

The court below went on to note "still other considerations" which support the constitutionality of the freezing regulations and then proceeded to discuss Cuba's conduct in nationalizing property owned by United States citizens. The court showed a most peculiar blindness to standards which it itself applied in its decision in *Banco Nacional* v. *Sabbatino*, 307 F. 2d 845, 864-868, reversed on other grounds by this Court, 376 U. S. 398. There the court of appeals held that a taking of property by the Cuban Government was a violation of international law because it discrim-

inated against Americans, because it was retaliatory and because there was no compensation for the property seized. Yet in the instant case a different panel of the same court holds that a taking of Cuban property by the United States Government is lawful even though it is discriminatory against Cubans, is in retaliation for Cuban seizures of American property and was not accompanied by any kind of compensation whatsoever.

We believe there is a distinction between the action of the Cuban Government in the *Sabbatino* case and the application of the regulations in this case, but we come to conclusions diametrically opposed to those reached by the court of appeals which, we submit, has managed to reach an incorrect decision in both cases. The regulations, as applied, are *not* a violation of international law, but they do violate our own Constitution, which is binding upon us even with respect to the property of aliens. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481.

It is no answer to seek to justify our seizure of the property of Cuban citizens on grounds of public policy. All governmental seizures of property are always sought to be justified by some public policy. We do not understand that there is any circumstance, short of war, in which a private person may be deprived of property lawfully held by him, without compensation.

2. This Court has said in *Guessefeldt* v. *McGrath*, *supra*, at 319:

> "The concern of the Trading with the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application."

See also *Clark* v. *Uebersee Finanz Corp.*, *supra*, at 488; *Markham* v. *Cabell*, 326 U. S. 404.

Confronted with ambiguous, poorly drafted legislation, the Court must interpret it to avoid constitutional questions if possible. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 569; *Ashwander* v. *T. V. A.*, 297 U. S. 288, 346 (Brandeis, J., concurring).

As is noted above, the Act was a wartime measure originally passed in October, 1917. It was intended to prohibit trading or other form of communication between any person in the United States and an enemy or ally of an enemy, except by license issued by the President. In the Emergency Banking Relief Act of 1933, 48 Stat. 1, Congress amended § 5(b) to provide for its applicability during time of war "or during any other period of national emergency declared by the President". It further gave the President power to regulate "any transactions in foreign exchange or the export, hoarding, melting or earmarking of gold or silver coin or bullion by any person in the United States". All reference to the property of foreign countries or their nationals was dropped from the Act, as was all reference to the power of the President to issue vesting orders.

In December, 1941, a few days after the attack on Pearl Harbor, the First War Powers Act, 55 Stat. 839, once again amended § 5(b) to its present form. It reincorporated in the section reference to property in which a foreign country or a national thereof had an interest and once again gave the President the power to vest the property of "any foreign country or national thereof".

The respondents now contend that, as a result of what is primarily wartime legislation, the President may exercise absolute peacetime control over property or transactions involving any foreign country or a resident thereof and, in so doing, deprive such a person of his property without compensation. We recognize, of course, that § 5(b) on its face refers not only to time of war but also to time

of national emergency. Those words, however, were inserted in the statute during the economic crisis of 1933. For the balance of that year and until the adoption of the Gold Reserve Act of 1934, 48 Stat. 337, § 5(b) was widely used, but only in connection with the domestic economic emergency. See, *e.g.*, *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240. There was much doubt as to the power of the President to proceed under § 5(b), both before and after the 1933 amendment, and two ratifying acts were passed by Congress: Act of March 9, 1933, 48 Stat. 1; Act of January 30, 1934, 48 Stat. 343, 12 U. S. C. § 213. See Memorandum of the Secretary of the Treasury appearing at *Hearings before Committee on Banking and Currency*, United States Senate, 73 Cong., 2d Sess., on S. 2236, page 9.

There can be little doubt that the Act as originally passed was "strictly a war measure [finding] its sanction in the constitutional provision (article I, section 8, cl. 11) empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning capture on land water.'" *Stoehr* v. *Wallace*, 255 U. S. 239, 241-242. As this Court said in *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, in authorizing the seizure of property as a war measure, Congress did not attempt the confiscation of property of alien friends.

The 1933 amendment to the law had nothing to do with foreign relations and, as we have noted, eliminated reference to the property of foreign countries or their nationals. The 1941 amendment was once again a war measure and, as this Court said in *Clark* v. *Uebersee Finanz-Korp.*, *supra*, at p. 487, there is no suggestion in the Act or its history that Congress was concerned with property that was not the property of our enemies in World War II.

In this framework, perhaps the words "national emergency" appearing in the statute can be extended to cover

a situation in which we are preparing for war, as in the latter part of 1940 and 1941 (see *Silesian-American Corp.* v. *Clark, supra,* at 476) but certainly they do not justify the seizure of private property to facilitate the imposition of economic sanctions upon a nation with which we are not at war and with which no war impends. As the Court noted in the *Silesian-American* case, caution is called for in expanding the war power clause to cover incidents not intimately connected with war.

The words "national emergency" were written into a wartime statute for a specific situation and cannot now be interpreted broadly so as to grant to the President the right he claims in this case, especially when to do so would raise constitutional issues of great import.

3. The Government and the court below both rely on the Presidential Proclamation of Emergency of December 16, 1950, early in the course of the Korean conflict. That proclamation cannot justify the regulations as applied here. There is no war or actual national emergency in effect today with respect to the Republic of Cuba.

This Court is not bound by a fifteen year old declaration of a national emergency, but may inquire whether there is in fact such an emergency which can support this deprivation of property. See *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398 at 442; *East New York Savings Bank* v. *Hahn,* 326 U. S. 230; *Woods* v. *Miller,* 333 U. S. 138, 147 (Mr. Justice Jackson concurring).

The national emergency declared by the President a decade and a half ago has become institutionalized in our national life and is used to justify a whole series of restrictions on personal liberties and property rights. As the Court of Appeals for the Ninth Circuit said in *Bauer* v. *United States,* 244 F. 2d 794, 797:

> "It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing."

It is time that we face up to the fact that there is no such thing as a chronic emergency.

4. The Trading with the Enemy Act is further unconstitutional on the ground that it delegates broad legislative power to the President. Neither the original Act of 1917 nor any of the amendments thereto have set up any standards whatsoever to guide the President in his application of § 5(b).

We are aware that the rules promulgated by this Court in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, have, of late, been honored, in large part, in the breach. We do not, however, believe that the cases cited by the court below and particularly *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, were intended to make totally unnecessary any legislative standards whatsoever. As a matter of fact, Joint Resolution of May 28, 1934, 48 Stat. 811, which was the subject of the *Curtiss-Wright* case, authorized a most circumscribed presidential act: the prohibition of the sale of a narrow class of commodities (munitions) to a narrow class of buyers ("those countries now engaged in armed conflict in the Chaco") with a time limit implied by the nature of the power (during the period of the Chaco War) and only if the President found such

a prohibition "may contribute to the reestablishment of peace". The broad language of the Court so frequently cited is dictum, and even if taken at its full value does not permit the granting of power to the President without any standards whatsoever.

Much reliance is placed on the argument that we are here considering the power of the President to regulate foreign affairs, a power which it said to be so delicate that it cannot be subject to congressional check or even judicial control. If so, it is also so delicate that it may not be delegated to subordinate officials who are themselves given no meaningful standards in their interpretation of the statute. Even if the *Curtiss-Wright* decision were authority for holding all presidential action related to foreign affairs was free from the requirement of legislative standards, the present regulations were issued, not by the President but by his designee, the Secretary of the Treasury. The ruling which is the subject of this motion was issued not by the Secretary of the Treasury but by the Director of the Office of Foreign Assets Control. The Director does not even report to the Secretary directly. She is responsible to the Assistant Secretary for International Affairs, through the Assistant to the Secretary (National Security Affairs). United States Government Organization Manual, 1963-1964, page 98.

In *Curtiss-Wright, supra,* at page 319, this Court said:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President, *alone,* has the power to speak or listen as representative of the nation." (Emphasis supplied.)

Thus, it must be questioned whether, statutory power to delegate notwithstanding, the President may constitutionally delegate these powers and, if they are delegated, whether they do not thereby lose whatever immunity from attack they otherwise would have. Neither the Secretary

of the Treasury nor the Director of Foreign Assets Control can claim to have the sensitive foreign policy functions which have been urged in justification of the broad powers resulting from the application of the regulations. In this case the Director, far removed from the President in the organizational structure of the Executive Branch, is depriving persons of property without hearing, subject to no administrative review and without the assistance of standards promulgated either by the Legislature or by the President.

Obviously some powers of the President cannot be delegated. *Runkle* v. *United States,* 122 U. S. 543; *Greene* v. *McElroy,* 360 U. S. 474, 495. If the language of the *Curtiss-Wright* case is to be given full weight, delegation of the delicate, non-reviewable powers of the President to a subordinate administrative official cannot be countenanced.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

July 18, 1966.

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 180—September Term, 1965.

(Argued December 9, 1965 Decided April 22, 1966.)

Docket No. 29560

JUAN RIGORES SARDINO,

Plaintiff-Appellant,

v.

THE FEDERAL RESERVE BANK OF NEW YORK and the SECRETARY OF THE TREASURY OF THE UNITED STATES,

Defendants-Appellees.

Before:

LUMBARD,
Chief Judge,

FRIENDLY and SMITH,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, Judge, granting a motion to dismiss a complaint which challenged the validity of regulations issued by the Secretary of the Treasury freezing bank deposits of Cuban nationals. Affirmed.

VICTOR RABINOWITZ (Rabinowitz & Boudin, New York, N. Y.), *for Appellant.*

Exhibit A

BRUNO A. RISTAU (John W. Douglas, Ass't Attorney General, Robert M. Morgenthau, United States Attorney, Morton Hollander, Attorney), *for Defendants-Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiff Sardino, a Cuban residing in Havana, has a savings account in a New York bank of some $7000, this being the proceeds of an insurance policy on the life of his son who died in New York. The bank would not remit the funds to Sardino in Cuba because the Cuban Assets Control Regulations,[1] 31 C. F. R. § 515.201, issued pursuant to the

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[1] This provides

§ 515.201. Transactions involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him), by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or

Exhibit A

Trading with the Enemy Act, § 5(b)(1), 50 U. S. C. App. § 5(b)(1), prohibited transfers outside the United States of property owned by Cuban nationals except with specific authorization. The Federal Reserve Bank of New York, acting as agent for the Secretary of the Treasury, refused to issue the required license because "transactions of this type are not consistent with the present policy of this Government with respect to Cuba." Sardino thereupon brought this action in District Court for the Southern District of New York against the Federal Reserve Bank and the Secretary of the Treasury for a direction that they issue a license or a declaration that none was required; he contended that

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the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specificaly authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals; or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

the Regulations were not authorized by the statute and that, if they were, the statute and the Regulations were unconstitutional as applied to him for various reasons discussed hereafter. Judge Palmieri granted defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. This appeal followed.

I.

The statutory authority for the Regulations seems plain enough. Section 5(b)(1) of the Trading with the Enemy Act, 50 App. U. S. C. § 5, says that:

> During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property,[2] subject to the Jurisdiction of the United States.

On December 16, 1950, President Truman, taking particular note of "recent events in Korea and elsewhere" but also making general reference to "the increasing menace of the forces of communist aggression," proclaimed the existence of a national emergency. 64 Stat. A454. The declaration has never been revoked; rather it has been repeatedly and recently reaffirmed. Exec. Order No. 10896, 26 F. R. 12281 (1960); Exec. Order No. 10905, 26 F. R. 321 (1961); Exec. Order No. 11037, 27 F. R. 6967 (1962). While the courts will not review a determination so peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe. Plaintiff's contention that the national emergency provision, which came into the statute at the time of the economic crisis of 1933, 48 Stat. 1, is limited to economic emergencies, is sufficiently answered by the breadth of the language. The understanding that the words mean all they say was illustrated by President Roosevelt's freezing the assets of nationals of Norway and Denmark on the invasion of those countries by Germany long before the United States was at war, Exec. Order No. 8389, 5 F. R. 1400 (1940).[3] We take the prompt Congres-

[2] The President has delegated the powers granted him by this legislation to the Secretary of the Treasury. 7 F. R. 1409 (1942). On October 15, 1962, the Secretary delegated the administration of foreign assets control regulation to the Office of Foreign Assets Control, Treas. Dept. Order 128.

[3] The extension of this program to nationals of other countries invaded by Germany and Japan is described in Goodman, United States Government Foreign Property Controls, 52 Geo. L. J. 767, 768-69 (1964).

sional ratification, 54 Stat. 179 (1940), as a demonstration of approval of what was already lawful rather than as an indication of doubt. See *Pike* v. *United States*, 340 F. 2d 487, 488 (9 Cir. 1965).

The claim that the statute constitutes an unconstitutional delegation of legislative power is foreclosed by *United States* v. *Curtiss-Wright Export Co.*, 299 U. S. 304 (1936). Although the delegation there sustained was narrower than that in § 5(b) of the Trading with the Enemy Act, the Court's opinion was not thus circumscribed. Painting with a broad brush, extensively analyzing the source of the foreign affairs power of the central government, and emphasizing the wide delegations by early Congresses familiar with the intent of the framers, the Court rather plainly meant to make clear once and for all, that "if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 299 U. S. at 320. See also *Zemel* v. *Rusk*, 381 U. S. 1, 17 (1965); *United States* v. *Von Clemm*, 136 F. 2d 968, 970 (2 Cir.), cert. denied, 320 U. S. 769 (1943).

The claim that the constitution is violated by the President's delegation of his power to issue regulations to the Secretary of the Treasury and the latter's delegation of administration of the regulations to the Office of Foreign Assets Control, is likewise insubstantial. The founders could not have meant to impose upon the President burdens that would make it humanly impossible to conduct his office as the nation grew. See *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 165 (1803). Congress can validly authorize the President to depute a portion of his duties in the field

of foreign affairs, as it can do with other high officers. Cf. *Jay* v. *Boyd*, 351 U. S. 345, 351 n. 8 (1956). The safeguard remains, as stated in the 1816 report of the Senate Committee on Foreign Relations that for all that is done, whether by him or in his name, the President "is responsible to the Constitution." See *United States* v. *Curtiss-Wright Export Corp., supra*, 299 U. S. at 319.

The only substantial contention is that the Regulations, as they have been applied to Sardino, deprive him of his property without due process of law in violation of the Fifth Amendment. The Government makes a three-fold response—Sardino has not been deprived of property, the Fifth Amendment does not protect non-resident aliens, and in any event the Government's action was not violative of due process.

The contention that Sardino has not been deprived of his property stresses that the Government has not taken over the bank account but has merely placed a temporary barrier to its transfer outside the United States. Indeed, the barrier is said to be not merely temporary but partial. Without a license Sardino can use the account to pay customs duties, taxes or fees owing to the United States, a state, or any instrumentality of either, 31 C. F. R. § 515.510, or can have the sum belonging to him invested in securities listed on a national securities exchange or issued by the United States, a state, or an instrumentality of either, 31 C. F. R. § 515.513; the Regulations also permit remittance not in excess of $100 a month for necessary living expenses, but only through payment to a blocked account of a Cuban bank in the United States, 31 C. F. R. § 515.521. Sardino effectively replies that he owes no customs duties, taxes or fees; that securities purchased at his instruction would be blocked to the same extent as the savings account; and that there would be little incentive for a Cuban bank to make monthly payments to him in Havana when the corresponding pay-

ments to it in the United States were blocked. To be sure, all this could change in short order if this country's relations with Cuba were to alter for the better. But the very considerations urged by the Government as showing that the emergency declared by President Truman in 1950 exsts in 1966 cast roubt on the reality of this prospect. While the Government points out also that, despite the broad language of the Regulations, § 515.201(a), the funds would be made available to Sardino if he sought refuge in this country as many of his fellow Cubans have done, see 49 Dept. of State Bull. 160 (1963), the record contains nothing to show any intention on his part to do this. The due process clause speaks in terms not of taking but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life. Compare *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415 (1922); *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590, 592-94 (1962); ALI, Restatement of Foreign Relations Law § 197 (Proposed Official Draft 1962).

The Government's second answer that "The Constitution of the United States confers no rights of non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders—and even to some without. Cf. *Reid* v. *Covert,* 354 U. S. 1, 5, 8 (1957).[4] This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are

[4] Exclusion of an alien is another matter. *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893); *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950).

still eager to attract foreign funds. In *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489, 491-92 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibiton of taking without just compensation—even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment." *United States* v. *Pink,* 315 U. S. 203, 228 (1942). See also *Guessefeldt* v. *McGrath,* 342 U. S. 308, 317-19 (1952).

It does not follow, however, that in dealing with the property of an alien the United States must be blind to the acts of the country of which he is a national; the Constitution protects the alien from arbitrary action by our government but not from reasonable response to such action by his own. The world today is not the classical international law world of black squares and white squares, where everyone is either an enemy or a friend. We are not formally at war with Cuba but only in a technical sense are we at peace —as the Havana Conference, held since this appeal was argued,[5] has dramatically shown. The founders could not have meant to tie one of the nation's hands behind its back by requiring it to treat as a friend a country which has

[5] The First Conference of the Solidarity of Peoples of Asia, Africa, and Latin America was held in Havana on January 3-15, 1966 to organize a program of subversion against the United States. The Conference created a General Secretariat having its headquarters at Havana and headed by the chairman of Cuba's Foreign Relations Committee. According to one commentator, "Havana was a natural choice as the operational headquarters for world-wide subversion and wars of national liberation, for it is dedicatedly anti-American and pro-Soviet, and has a well-developed apparatus of subversion already active in the hemisphere." Bethel, *The Havana Conference,* The Reporter, March 24, 1966, at 25, 28.

launched a campaign of subversion throughout the Western Hemisphere. Compare *Dennis* v. *United States*, 341 U. S. 494, 561-70 (1951) (concurring opinion of Mr. Justice Jackson). Hard currency is a weapon in the struggle between the free and the communist worlds; it would be a strange reading of the Constitution to regard it as demanding depletion of dollar resources for the benefit of a government [6] seeking to create a base for activities inimical to our national welfare.[7] The Supreme Court's approval of wartime seizure of assets of a non-enemy alien "as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government," *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 476 (1947), is broad enough to justify the refusal of a license to Sardino.

Still other considerations support the constitutionality of the freezing order. Cuba has adopted a program expropriating property within its territory owned by designated American nationals, with a system of compensation holding out only an "illusory" possibility of payment. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 401-05 and nn. 3, 4 and 7 (1964). Although recognizing the Cuban expropriation under the act of state doctrine, the Court in that case pointed to the very freezing regulations here at

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[6] Any dollar exchange received by Sardino would have to be exchanged for pesos at the National Bank of Cuba within ten days, Law No. 30 of Feb. 23, 1961, Art. 23, 29 Leyes del Gobierno Provisional de la Revolución 25 (1961); 13 International Monetary Fund Annual Report on Exchange Restrictions 91 (1962).

[7] See Joint Resolution of Oct. 3, 1962, 76 Stat. 697; Dept. of State Pub. No. 7171, 25-28 (1961); 47 Dept. of State Bull. 599 (1962); Report of the Investigating Committee appointed by the Council of the OAS, OEA/Ser. G/IV (1964); Resolution I, Ninth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. F./II.9 (1964).

issue as exemplifying "the capacity of the political branches to assure, through a variety of techniques . . . that the national interest is protected against a country which is thought to be improperly denying the rights of United States citizens." 376 U. S. at 412. We see no need to debate whether this approving nod was dictum or a ground for recognition of the expropriation of property of our nationals in Cuba, which the Court might have declined to make if it had thought the United States powerless to protect itself by freezing the property of Cuban nationals here. There is a long history of governmental action compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad. A famous instance is the Litvinov Assignment by which claims of the Soviet Union and its nationals [8] against the United States and its nationals were transferred to our Government to be used to reimburse American citizens whose property had been seized in Russia. See *United States* v. *Belmont*, 301 U. S. 324 (1937), and *United States* v. *Pink*, 315 U. S. 203 (1942). Although there the taking of the assets of the Russian corporations had been accomplished by their own government and the foreign creditors in *Pink* had no rights of ownership in the corporate assets transferred to the United States, other precedents cannot be disposed of on those grounds. The Treaty of Berlin, 42 Stat. 1939, 1940-41 (1921), terminating World War I with Germany, confirmed the retention of vested enemy property in the control of the United States until the German government had satisfied all war claims of our citizens; the Supreme Court has said "it does not matter

[8] One of these was by the Russian Volunteer Fleet, whose claim had been the occasion for the Supreme Court's pronouncement that the Fifth Amendment protected non-enemy aliens from a taking of their property without just compensation, 282 U. S. 481 (1931).

whether this action was taken simply to secure claims of American citizens against Germany or was regarded as the rightful withholding of spoils of war." *Guessefeldt* v. *McGrath*, 342 U. S. 308, 313-14 (1952). The treaties of peace with Bulgaria, Hungary and Roumania at the end of World War II provided that any property of their nationals, blocked long before we were at war, Exec. Order No. 8389 of April 10, 1940, should vest in an agency or officer designated by the President and, after payment of debts owed by the owner, should be used to pay claims of United States nationals against the three countries. 22 U. S. C. §§ 1631a, 1641a. While these had been enemy countries, it is not clear that this was crucial. See *Guessefeldt* v. *McGrath, supra*; 2 O'Connell, International Law 846-48 (1965). In any event Congress followed the same course to compensate United States citizens for Czechoslovakian expropriations occurring after the war, setting up a fund out of the proceeds of Czech-owned steel mill equipment ordered here in 1947 and blocked and sold in 1954 by the Secretary of the Treasury. 22 U. S. C. §§ 1642a, c, and *1*; see 1958 U. S. Code Cong. & Ad. News 3299, 3301.

Congress has already taken steps to determine the claims of our nationals against Cuba, 22 U. S. C. § 1643, although without as yet providing for their payment. In *Propper* v. *Clark*, 337 U. S. 472, 484 (1949), the Court noted that a pre-war freezing order served the salutary purpose of immobilizing the assets of foreign nationals until our Government could determine whether they were needed "to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." This would seem a rather clear intimation that if Congress should ultimately choose to apply the blocked assets of Cuban nationals to that purpose, the Fifth Amendment would not stand in its way. The unquestioned right of a state to protect its nationals in their persons and property

while in a foreign country, see I Oppenheim, International Law § 319 at 686-87 (8th ed. Lauterpacht 1955), must permit initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail. See Colbert, Retaliation in International Law 63-69 (1948). To be sure, Congress has not yet chosen to invoke the ultimate sanction, having indeed eliminated a provision for the sale of certain Cuban assets to pay the expenses of administering the claims program, see 79 Stat. 988 (1965), amending 78 Stat. 1113 (1964), and 1965 U. S. Code Cong. & Ad. News 3581, 3583-84. Such commendable forbearance should not be understood as connoting lack of power.

II.

Although the foregoing disposes of the contentions raised by the appellant, we must now consider a point not suggested either by him or by the Government and consequently neither considered by the district court nor noted by us at the argument. This is whether we must vacate Judge Palmieri's order on the ground that the action was within 28 U. S. C. § 2282, commanding that:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

It seems indeed passing strange that a statute intended to protect the Government against invalidation of an Act of Congress by a district judge without the assistance of two other judges, one of whom shall be a circuit judge, could

be read as requiring a fresh start in a case where no one has invoked the procedure thus afforded, only questions of law were presented, the district judge validated the challenged legislation,[9] and three circuit judges had come to the same conclusion before the point was noticed. Indeed, if the case required, we would be disposed to reexamine whether despite intimations by the Supreme Court, *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 153 (1963), and decisions of other circuits, *Riss & Co.* v. *Hoch,* 99 F. 2d 553, 555 (10 Cir. 1938); *Borden Co.* v. *Liddy,* 309 F. 2d 871 (8 Cir. 1962), cert. denied, 372 U. S. 953 (1963), so bizarre a result was truly demanded. *Cf.* D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 76-77 (1964).[10] We have concluded, however—although with the misgivings regularly encountered in applying this deceptively simple statute and its counterpart, § 2281, dealing with state legislation—that the case did not fall within § 2282, since the substantial constitutional attack was not upon the Trading with the Enemy Act but upon the Cuban Assets Control Regulations.

When Congress adopted what is now § 2282 by the Act of August 24, 1937, 50 Stat. 751, it had as a model § 266 of the Judicial Code, now 28 U. S. C. § 2281. That statute, originally enacted in 1910, 36 Stat. 557, requiring three-judge courts when a plaintiff sought to restrain the enforcement

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[9] It is settled that, despite their apparently contrary wording, the three-judge statutes, 28 U. S. C. §§ 2281 and 2282, apply although the single judge did not grant relief. *Ex parte Metropolitan Water Co.,* 220 U. S. 539 (1911).

[10] The very fact that the alleged jurisdictional defect could probably be cured by our vacating the district court's judgment, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, 716 (1962), and the Chief Judge's designating Judge Palmieri and two of us to constitute the three-judge court, argues against such useless shuffling rather than for it.

of any "statute of a state" upon the ground of unconstitutionality, was amended in 1913, 37 Stat. 1013, to include "an order made by an administrative board or commission acting under and pursuant to the statutes of such state.". In adopting § 2282 Congress declined to follow that precedent. Only Acts of Congress were mentioned; orders of federal boards and commissions were not. Despite a statement that the 1913 amendment was "superfluous," *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292 (1923), the Supreme Court later held that the omission of any reference to federal administrative regulations or orders in § 2282 must be regarded "as deliberate and as indicating a limitation deemed to be advisable. It does not appear to have been the intention of Congress that direct appeal should lie to this Court when administrative action and not the Act of Congress is assailed." *William Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 173-74 (1939). Accordingly the Court dismissed the appeal in that case since, although both the authorizing statute and the Treasury Regulations were claimed to be unconstitutional, the Court regarded the attack on the former as insubstantial. See also *Coffman* v. *Breeze Corps.,* 323 U. S. 316, 317-18 n. 1 (1945).

To be sure *Jameson* cannot mean that § 2282 is rendered inapplicable simply because an order is the immediate object of the attack. Acts of Congress are not self-enforcing and when the executive or administrative action complained of is so plainly directed or permitted by the statute that no fair construction could hold otherwise, see *Rusk* v. *Cort,* 369 U. S. 367, 370 n. 4 (1962); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963); *Schneider* v. *Rusk,* 372 U. S. 224 (1963), the constitutionality of the statute is necessarily drawn in question. See D. Currie, *supra* at 53. The gray area is when an Act of Congress confers authority on an administrator in general terms which could be read either to embrace or to exclude the challenged action, and applica-

tion of the statute is clearly constitutional in certain cases but arguably not so in the administrative scheme under attack. From a merely conceptual standpoint it could be said that the plaintiff is challenging the constitutionality of the Act as applied, and *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921), could be cited to support that view. Whatever the philosophical merits of such an argument, its acceptance in this area would largely drain of vitality the distinction taken in *Jameson,* and would improperly require the cumbersome three-judge procedure in cases where, if the court regarded the constitutional claim as serious, it would be bound to interpret the legislative mandate as not authorizing the regulation and leave the constitutionality of the Act of Congress untouched. Cf. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407-08 (1909); *Kent V. Dulles,* 357 U. S. 116, 129 (1958). In this latter respect the problem under § 2282 differs vitally from that in *Dahnke-Walker,* dealing with appeals to the Supreme Court from state courts, 28 U. S. C. § 1257(2), where the reach of the statute has already been authoritatively determined by the state tribunal and the question of constitutionality must be resolved.[11] The Court has admonished, in a decision not irrelevant on its facts, that § 2281 should be read "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such," *Phillips* v. *United States,* 312 U. S. 246, 251 (1941); and this Term's decision in *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965), is further evidence of its

[11] In *Zemel* v. *Rusk,* 381 U. S. 1, 6 (1965), the Court went to some pains to avoid the issue here discussed, finding the attacks on the statute itself to be substantial; particularly in view of this we do not regard the brief *per curiam in FHA* v. *The Darlington, Inc.,* 352 U. S. 977 (1957), as settling the law contrary to the views we have expressed.

disposition to give a rather narrow reading to the three-judge requirement of § 2281. Such considerations apply *a fortiori* to § 2282 where there is no clash of sovereignties and, for that reason or others, Congress deliberately occupied a smaller field.

For reasons elaborated in Part I of this opinion, we do not consider Sardino's claims of unconstitutional delegation in the Trading with the Enemy Act, § 5(b), to be substantial, and we should likewise not so regard a contention that the due process clause forbids Congress from making any provision for control of the property of a non-enemy alien in times of peace. Sardino's one serious constitutional argument, that a peacetime freeze of indefinite duration not clearly for his benefit violates due process, must thus be regarded as a claim that the administrators of an Act of Congress, valid if less expansively applied, acted with too heavy a hand. As we read 28 U. S. C. § 2282, consideration of such a claim did not demand the convocation of a three-judge court.[12]

Affirmed.

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[12] We are thus not required to consider whether the district judge's failure to request the assistance of two others could be supported by the fact that the request was simply for declaration of invalidity coupled with a mandatory injunction limited to Sardino's case, rather than for an order broadly prohibiting enforcement of the statute and Regulations. As to this, contrast *FHA* v. *The Darlington, supra,* 352 U. S. 977; *Zemel* v. *Rusk, supra,* 381 U. S. 1, with *Kennedy* v. *Mendoza-Martinez, supra,* 372 U. S. 144, 154-55. See also D. Currie, *supra,* at 17 n. 94.

Exhibit B

Relevant Statutes and Regulations

The pertinent provisions of the Trading with the Enemy Act (50 App. U. S. C. § 1 *et seq.*) are as follows:

> § 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver
>
> * * *
>
> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation or, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest

or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;

* * *

"§ 7. Lists of enemy or ally or enemy officers, directors or stockholders of corporations in United States; act constituting trade with enemy prior to passage of act; requiring property conveyed to custodian; voluntary payment to alien property custodian by holder; acts under order, rule, or regulation

* * *

(c) If the President shall so require any money or other property . . . belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act."

"§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, . . . may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require;

> and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: . . . If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled." . . .

The relevant treaty provisions are as follows:

The Buenos Aires Protocol of Non-Intervention of December 23, 1936 (51 Stat. 41, T. S. 923, 166 L. N. T. S. 31) provides:

> "Article 1. The High Contracting Parties declare inadmissible the intervention of any of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties."

The Charter of the Organization of American States signed at Bogota, April 30, 1948 (2 U. S. T. 2395, T. I. A. S. 2361, 119 U. N. T. S. 3) provides as follows:

> "Article 15
>
> No State or group of states has the right to intervene, directly or indirectly, for any reason whatever,

in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personalty of the State or against its political, economic and cultural elements."

The relevant provisions of the Cuban Assets Control Regulations (31 C. F. R. § 515.101, *et seq.*) are as follows:

SUBPART B-PROHIBITIONS

§ 515.201. Transaction involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designed by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

Exhibit B

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings, in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term 'foreign country designated under this part' and the term 'designated foreign country' mean Cuba and the team 'effective date' and the term 'effective date of this section' mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963."

* * *

"§ 515.510. Payments to the United States, States and political subdivisions.

(a) The payment from any blocked account to the United States or any agency or instrumentality thereof or to any State, territory, district, county, municipality or other political subdivision in the United States, of customs duties, taxes, and fees payable thereto by the owner of such blocked account is hereby authorized.

(b) This section also authorizes transactions incident to the payment of customs duties, taxes, and fees from blocked accounts, such as the levying of assessments, the creation and enforcement of liens, and the sale of blocked property in satisfaction of liens for customs duties, taxes, and fees."

* * *

"§ 515.513. Purchase and sale of certain securities.

(a) The bona fide purchase and sale of securities on a national securities exchange by banking institutions within the United States for the account, and pursuant to the authorization, of nationals of a designated foreign country and the making and receipt of payments, transfers of credit, and transfers of such securities which are necessary incidents of any such purchase or sale are hereby authorized provided the following terms and conditions are complied with:

(1) In the case of the purchase of securities, the securities purchased shall be held in an account in a banking institution within the United States in the name of the national whose account was debited to purchase such securities; and

(2) In the case of the sale of securities, the proceeds of the sale shall be credited to an account in the name of the national for whose account the sale was made and in the banking institution within the United States which held the securities for such national.

(b) This section does not authorize the crediting of the proceeds of the sale of securities held in a blocked account or a subaccount thereof to a blocked account or subaccount under any name or designation which differs from the name or designation of the specific blocked account or subaccount in which such securities were held.

"§ 515.521. Certain remittances for necessary living expenses.

(a) Remittances by any person to any individual who is a resident of a foreign country and is within

that foreign country are hereby authorized on the following terms and conditions:

(1) Such remittances are made only for the necessary living expenses of the payee and his household and do not exceed $100 in any one calendar month to any one household;

(2) Such remittances are not made from a blocked account other than from an account in a banking institution within the United States in the name of, or in which the beneficial interest is held by, the payee or members of his household.

(3) Such remittances are not made from a blocked account which is blocked pursuant to Executive Order No. 8389, as amended;

(4) If the payee is within a designated foreign country, such remittances must be made through a domestic bank and any domestic bank is authorized to effect such remittances which, however, may be effected only by the payment of the dollar amount of the remittance to a domestic bank for credit to a blocked account in the name of a banking institution within such country.

* * *

Presidential Proclamation of December 16, 1950, 64 Stat. A454, reads as follows:

"PROCLAIMING THE EXISTENCE OF A NATIONAL EMERGENCY BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitutes a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

Exhibit B

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

I summon all citizens to make a united effort for the security and well being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

I summon our farmers, our workers in industry, and our businessmen to make a mightly production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

Exhibit B

I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby 'secure the Blessings of Liberty to ourselves and our Posterity.'

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 16th day of December, 10:20 a. m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

[SEAL]

HARRY S. TRUMAN.

By the President:

DEAN ACHESON
Secretary of State"

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 356

JUAN RIGORES SARDINO, PETITIONER

v.

THE FEDERAL RESERVE BANK OF NEW YORK AND THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. 16–32) is reported at 361 F. 2d 106. The opinion of the district court (App. 15a–24a) [1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1966 (Pet. 16). The petition for a writ of certiorari was filed on July 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The reference "App." is to the record appendix to petitioner's brief in the court of appeals.

QUESTIONS PRESENTED

1. Whether the Cuban Assets Control Regulations of July 8, 1963, are authorized by the Trading with the Enemy Act.

2. Whether the Cuban Assets Control Regulations and the Trading with the Enemy Act, as applied to "freeze" funds held in the New York bank account of a resident and national of Cuba are constitutional.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended (55 Stat. 839, 50 U.S.C. App. 1 *et seq.*) and the Cuban Assets Control Regulations (31 C.F.R., Part 515) are set out in the petition at pages 33–34, 36–39.

STATEMENT

Petitioner, a national of Cuba and a resident of Havana, maintains a savings account in a New York bank (App. 3a–4a). In July 1963 all property in the United States belonging to the Cuban government and to Cuban nationals was "frozen" pursuant to the Cuban Assets Control Regulations. In March 1964 petitioner filed with the Foreign Assets Control Division of the Federal Reserve Bank of New York an application for a license to withdraw his funds from the United States (App. 6a–8a). The application was referred to the Office of Foreign Assets Control, Department of the Treasury, where it was denied on the ground that "[t]ransactions of this type are not consistent with the present policy of this Government

with respect to Cuba" (App. 8a–9a). A request for reconsideration was also denied (App. 9a–11a).

Petitioner then commenced this action in the United States District Court for the Southern District of New York (App. 3a–5a), in which he challenged the Treasury Department's action in denying his application for a license, the Cuban Assets Control Regulations, and the statutory basis therefor. The complaint sought judgment (1) directing the Federal Reserve Bank of New York and the Secretary of the Treasury to grant a license for withdrawal of the funds or (2) declaring that no license was required to permit withdrawal or (3) declaring that Section 5 of the Trading with the Enemy Act, 50 U.S.C. App. 5, and the Cuban Assets Control Regulations are unconstitutional (App. 5a).

Respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (App. 13a–14a). The district court rejected petitioner's attack upon the validity of the government's action in freezing Cuban assets (App. 15a–24a) and dismissed the complaint (App. 25a). The court of appeals affirmed (Pet. 16–32).

ARGUMENT

The decisions below dismissing the complaint are clearly correct. The petition does not present any conflict or other consideration warranting further review by this Court. Petitioner's principal contentions are (1) that the Cuban Assets Control Regulations are not authorized by Section 5(b) of the Trading with the Enemy Act, (2) that Section 5(b) of the

Act involves an unconstitutional delegation of legislative power, and (3) that the Act and the regulations, as applied to him, entail a deprivation of property in violation of the Fifth Amendment. As we show below, none of these contentions is meritorious.

1. Contrary to petitioner's position, the Cuban Assets Control Regulations are fully authorized by the provisions of Section 5(b) of the Trading with the Enemy Act. That Section 5(b) is not solely a war measure in the sense that we must formally be at war with Cuba to warrant a "freeze" of assets in this country belonging to Cuba or her nationals is clear from the language of the Act, as well as from the congressional and judicial validation of its application in the freezing of foreign property prior to this country's entry into World War II.[2]

As initially enacted, Section 5(b) of the Trading with the Enemy Act[3] authorized the President to regulate foreign exchange transactions, the export of gold or silver coin or currency, and transfers of credit or evidences of indebtedness or property "between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries." By Joint Resolution of May 7, 1940, 54 Stat. 179, Congress amended the Section to grant to the President broad regulatory power over property "in which any foreign state or a national or political subdivision thereof, as de-

[2] For a discussion of foreign property controls see Goodman, *United States Government Foreign Property Controls*, 52 Geo. L. J. 767 (1964).

[3] Act of October 6, 1917, 40 Stat. 411, 415.

fined by the President, has any interest * * *." Further, the Joint Resolution specifically reiterated that the powers conferred on the President could be exercised by him "[d]uring time of war or *during any other period of national emergency declared by the President*" (emphasis added).[4]

Under that amendment, prior to our entry into World War II, the government carried on an extensive and restrictive regulation of foreign-owned property, culminating in the freezing of assets of nationals of countries in all of continental Europe, China and Japan. E. O. No. 8389, 5 Fed. Reg. 1400 (April 10, 1940);[5] E. O. No. 8785, 6 Fed. Reg. 2897 (June 14, 1941); E. O. No. 8832, 6 Fed. Reg. 3715 (July 26, 1941). In Executive Order No. 8785, which extended to all of Europe the freezing controls that Executive Order No. 8389 had applied with respect to Norway and Denmark, the President declared the "existence of a period of unlimited national emergency." These orders were designed "to prevent the use of financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted

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[4] Section 5(b) of the Trading with the Enemy Act was earlier amended during the banking emergency of 1933 to make clear that the President could exercise regulatory power over banking institutions not only in time of war but also "[d]uring any other period of national emergency declared by the President * * *." Act of March 9, 1933, Section 2, 48 Stat. 1.

[5] In the Joint Resolution of May 7, 1940, *supra*, Congress, in addition to enlarging the regulatory powers conferred upon the President in Section 5(b), also ratified the action of the President in this Executive Order.

by duress or conquest, and to curb subversive activities in the United States." U.S. Treasury Department, *Documents Pertaining to Foreign Funds Control* 64 (1946). And in *Propper* v. *Clark*, 337 U.S. 472, 486, the Court said that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, "put into effect a valid plan for control of the property covered by the regulation," which prevented a transfer of title to certain frozen Austrian property without a license.

Upon the entry of the United States into the war, Congress, in Section 301 of the First War Powers Act, 1941, 55 Stat. 839, further amended Section 5(b) of the Trading with the Enemy Act to read in pertinent part as it does today. It again confirmed the President's regulatory power, during time of war "or during any other period of national emergency declared by the President," over "any property in which any foreign country or a national thereof has any interest * * *."

The condition precedent to the exercise of the powers conferred by Section 5(b)—*i.e.*, a "national emergency declared by the President"—has clearly been met.[6] On December 16, 1950, the President declared (Proclamation No. 2914, 64 Stat. A454) "the existence of a national emergency" based upon the "increasing menace of the forces of communist aggression" (Pet. 39–41). And the continuing existence of such "national emergency" was declared in

[6] Petitioner's suggestion (Pet. 10–11) that the "national emergency" language in Section 5(b) has reference solely to a domestic economic crisis such as the banking emergency in 1933, is wholly without merit. See *Pike* v. *United States*, 340 F. 2d 487 (C.A. 9).

1960 (E.O. No. 10896, 25 Fed. Reg. 12281), in 1961 (E.O. No. 10905, 26 Fed. Reg. 321), and 1962 (E.O. No. 11037, 27 Fed. Reg. 6967). In light of the notoriously strained relations between the United States and Cuba, evidenced by the severance of diplomatic relations in January 1961 and the international crisis precipitated by the discovery of Soviet missile installations in Cuba in October 1962, it can hardly be said that the declared emergency and its relevance to relations with Cuba are merely technical or in any sense fictional. Petitioner's assertion (Pet. 12) that there is no "actual national emergency in effect today with respect to the Republic of Cuba" is wholly unpersuasive. Indeed, the court of appeals observed (Pet. 24) that "only in a technical sense are we at peace" with Cuba.

The Cuban Assets Control Regulations, 31 C.F.R., Part 515, here in issue, were promulgated by the Secretary of the Treasury on July 8, 1963.[7] The regulations reflected the continuation of a policy which had previously led the Secretary of State to terminate diplomatic and consular relations with Cuba and to impose restrictions on travel to Cuba (26 Fed. Reg. 492). Furthermore, in the Foreign Assistance Act

[7] Petitioner's contention (Pet. 14) that the President could not validly delegate his power under Section 5(b) is patently without merit. Section 5(b)(1) authorizes the President to act "through any agency that he may designate." Moreover, as the court below noted (Pet. 21–22), the Constitution presents no bar to such delegation in the field of foreign affairs or in any other. See *Marbury* v. *Madison*, 1 Cranch 137, 166.

of 1961,[8] Congress provided that no assistance be furnished under that Act to the present government of Cuba, and authorized the President to establish and maintain a total embargo upon all trade between the United States and Cuba. In February 1962 such an embargo was proclaimed.[9] In 1962[10] and in 1963[11] Congress enacted restrictions on assistance to countries which assisted the government of Cuba. And on October 3, 1962, Congress passed a Joint Resolution,[12] stating the determination of the United States

> * * * to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere * * *.

Given the state of affairs as perceived by both the Executive and Legislative branches of the government, there is simply no basis for petitioner's contention that the regulations in question exceed the authority delegated by Section 5(b) of the Trading with the Enemy Act.

2. Equally without merit is petitioner's contention that Section 5(b) of the Act is an unconstitutional

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[8] Sec. 620(a), 75 Stat. 444, 22 U.S.C. 2370(a).

[9] Presidential Proclamation No. 3447, 27 Fed. Reg. 1085 (February 6, 1962). The Cuban Import Regulations issued in connection with that embargo, 27 Fed. Reg. 1116, as amended 27 Fed. Reg. 2765, were subsequently revoked by the Cuban Assets Control Regulations.

[10] Act of August 1, 1962, 76 Stat. 260.

[11] Act of December 16, 1963, 77 Stat. 386.

[12] 76 Stat. 697.

delegation of legislative power in that it does not set forth standards for the exercise of the powers granted. Section 5(b) expressly states the powers conferred (prevention and prohibition of transfers and withdrawals), the subject matter (property of any foreign country or a national thereof), and the limit on the occasion of the exercise of such powers ("time of war or during any other period of national emergency"). Moreover, as this Court pointed out in *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320, legislation "within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

In *Zemel* v. *Rusk*, 381 U.S. 1, in rejecting an identical argument with respect to restrictions imposed by the Executive on travel to Cuba, under the Passport Act of 1926 (22 U.S.C. 211a), this Court said (381 U.S. at 17):

> It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas.

See, also, *United States* v. *Von Clemm,* 136 F. 2d 968, 970–971 (C.A. 2), certiorari denied, 320 U.S. 769.

3. Petitioner also claims that the statute and regulations, as here applied, violate his constitutional rights under the Fifth Amendment. Under the regulations, petitioner has been prevented from withdrawing dollars from the United States. Were he to withdraw those dollars, he would be required by Cuban law (Pet. 25, n. 6) to surrender them for pesos at the National Bank of Cuba. It is that diversion of dollars into the hands of a regime, deemed by the Executive and Congress to be at present hostile to the United States, that the regulations seek to preclude. They do no more than is necessary to achieve that end. Petitioner's bank account in New York has not been seized by or vested in the United States. Compare *Silesian-American Corp.* v. *Clark,* 332 U.S. 469. It has been frozen in the United States. Petitioner may, without license, have the fund invested in securities (31 CFR § 515.513); he may use it to pay customs duties or taxes owed in the United States (31 CFR § 515.510); if he seeks refuge here, the funds will be available to him (49 Dept. of State Bull. 160 (1963)). When and if the present disagreements between the United States and Cuba are resolved or mitigated the frozen fund will in all likelihood be released.

While it may well be that the curtailment or deferral of his use of the fund is a burden to petitioner, this Court has long recognized that "[f]rustration and

appropriation are essentially different things." *Omnia Commercial Co.* v. *United States,* 261 U.S. 502, 513. Many restrictive regulations effectively deprive owners of the use of their property without constituting an impermissable taking. "A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless" without falling within the proscription of the Fifth Amendment. *Knox* v. *Lee,* 12 Wall. 457, 551. Here, as in *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 166, the government has not taken possession of the property in issue but only curtailed its use. While the Court has recognized that in time of emergency property may be destroyed altogether without compensation (*United States* v. *Caltex* (*Philippines*), *Inc.,* 344 U.S. 149; *Bowditch* v. *Boston,* 101 U.S. 16), here the freezing of petitioner's bank account merely serves to preserve the *status quo* pending the resolution of the present disagreements between the United States and Cuba—including the disposition of American claims for property expropriated by the Cuban government. Cf. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 412.

The imposition, in peace time as well as war, of freezing regulations under Section 5(b) of the Trading with the Enemy Act has been considered and sustained by this Court in the past. See *Propper* v. *Clark,* 337 U.S. 472; *Zittman* v. *McGrath,* 341 U.S. 446. Moreover, the validity of the economic measures imposed by foreign assets control regulations both

prior to and after World War II has been upheld in criminal prosecutions for violations of those regulations. See *United States* v. *Qoung,* 303 F. 2d 499, (C.A. 6), certiorari denied, 371 U.S. 863; *United States* v. *China Daily News,* 224 F. 2d 670 (C.A. 2), certiorari denied, 350 U.S. 885; *United States* v. *Von Clemm, supra; United States* v. *Broverman,* 180 F. Supp. 631 (S.D.N.Y.). In the circumstances, there is no compelling reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys.

SEPTEMBER 1966.

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Supreme Court of the United States

October Term, 1966

No. 356

JUAN RIGORES SARDINO,

Petitioner,

against

THE FEDERAL RESERVE BANK OF NEW YORK and THE SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

September 30, 1966

IN THE

Supreme Court of the United States

October Term, 1966

No.

JUAN RIGORES SARDINO,

Petitioner,

against

THE FEDERAL RESERVE BANK OF NEW YORK and THE SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY

Respondent, in its brief in opposition to the petition for certiorari, makes no serious response to petitioner's contention that the Cuban Assets Control Regulations as applied in this case deprived petitioner of his property without due process of law. Petitioner relied principally on *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, *Guessefeldt* v. *McGrath*, 342 U. S. 308 and *Clark* v. *Uebersee Finanz Corp.*, 332 U. S. 480. The latter two cases are not even mentioned by respondent, while the first is cited only to make the distinction between the "freezing" of petitioner's property in this case and the vesting in *Silesian-American*. This is a distinction without a difference. As the Court of Appeals pointed out in this case, it can hardly be denied that a long-continued freeze, without any termination date, is as much a taking of property as is a vesting order.

Respondent places principal reliance on *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155. That was a wartime case in which the Court held that an order prohibiting petitioner from operating its gold mines was valid, because it made scarce mining equipment and sorely-needed manpower available for other purposes. We do not see any similarity to this case. More in point, we suggest, is *United States* v. *Peewee Coal Co.*, 341 U. S. 114, where, even in time of war, the United States was held liable under the Fifth Amendment for operating losses sustained by a coal mine operator whose property was possessed by the United States for a few months to avert a strike. The Court held that there was a taking of Peewee's properties, although the actual operation of the mines was not affected by any significant degree. The decision was by a divided Court. Justice Reed, concurring, recognized that "whatever the nature of the 'taking', the test should be the constitutional requirement of 'just compensation' ", 341 U. S. 119, 121. Even the dissenting justices agreed there had been a "taking", but believed there should be no compensation because "nothing of value was taken from the company." 341 U. S. at 121, 122.

Many of the cases involving application of freeze regulations cited by the respondent at pages 11 and 12 of its reply were discussed in the petition for certiorari. In *Propper* v. *Clark*, 337 U. S. 472, and *Zittman* v. *McGrath*, 341 U. S. 446, no constitutional issue was considered by the Court or even raised by the parties nor could such issues have been raised on those records. *United States* v. *Von Clemm*, 136 F. 2d 968, did not involve the taking of property but only the imposition of import controls, a matter which would not seem to raise any constitutional issue either under the Fifth Amendment or otherwise.

Respectively submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

September 30, 1966